No. 17-1091

IN THE
Supreme Court of the United States

TYSON TIMBS AND A 2012 LAND ROVER LR2,
Petitioner,

v.

STATE OF INDIANA,
Respondent.

On Petition for Writ of Certiorari to the Indiana Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Eighth Amendment's Excessive Fines Clause restricts States' use of civil asset forfeitures.

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INTRODUCTION

Tyson Timbs used his 2012 Land Rover LR2 to purchase and sell heroin in Indiana. After Timbs pled guilty to dealing and conspiracy charges, the State sought forfeiture of the Rover. The trial court and the Indiana Court of Appeals refused to allow the forfeiture on the ground that it violated the Excessive Fines Clause of the Eighth Amendment. But the Indiana Supreme Court reversed and—though neither the State nor Timbs addressed the question—held that the Excessive Fines Clause does *not* apply against the States.

Timbs seeks review of that holding, but his Rover provides an unsound vehicle for deciding whether the Excessive Fines Clause restricts States' use of civil asset forfeitures. In sum, the question was not briefed below and is encumbered by the analytically distinct question whether and how the Excessive Fines Clause applies to state civil asset forfeitures specifically. Moreover, because every state constitution already prohibits excessive fines, and because no lower court has engaged in the incorporation analysis for itself, there are good reasons for the Court to avoid rushing to a decision on the question of Excessive Fines Clause incorporation.

STATEMENT OF THE CASE

The investigation into Timbs's heroin trafficking began with a tip from a confidential informant, which led police to arrange for a controlled drug purchase.

Officers met Timbs and the informant at an apartment building in Marion, Indiana and, after receiving assurances from Timbs regarding the purity of the drugs, purchased two grams of heroin. Hrg. Tr. 25:09–27:07 (July 15, 2015). The officers spoke with Timbs about purchasing more heroin from him at a later date and observed Timbs leave in his Rover. Hrg. Tr. 27:10–25. They arranged a second controlled purchase, where they bought two more grams of heroin from Timbs, and then a third a few days after that. Hrg. Tr. 29:01–30:12. Police arrested Timbs—and seized his Rover—while he was en route to the third sale. Hrg. Tr. 13:13–25; 14:06–08.

While he was in custody, and after being advised of his *Miranda* rights, Timbs told officers that he would drive his Rover from Marion to Richmond, Indiana, to pick up heroin several times a week. Hrg. Tr. 14:09–15:18. At the forfeiture hearing, Timbs explained that he made these trips to Richmond "probably a lot" and put "a lot" of miles on the Rover doing so. Hrg. Tr. 36:09–14.

The State charged Timbs with two counts of Class B felony dealing in a controlled substance and one count of Class D felony conspiracy to commit theft. Pet. App. 3. Timbs pled guilty to the conspiracy count and one of the drug dealing counts in exchange for dismissal of the remaining dealing charge. *Id.* He was sentenced to one year of home detention and five years of probation; he also agreed to pay investigation costs of $385, an interdiction fee of $200, court costs of $168, a bond fee of $50, and a court-certified drug-

and-alcohol assessment fee of $400, for a total of $1,203.00 in fees and costs. *Id.*

The law of Indiana, as with most States, permits the State to seize instrumentalities of the drug trade through civil asset forfeiture proceedings. *See United States v. Bajakajian*, 524 U.S. 321, 333 (1998) ("Instrumentalities historically have been treated as a form of 'guilty property' that can be forfeited in civil *in rem* proceedings."); Caleb Nelson, The Constitutionality of Civil Forfeiture, 125 Yale L.J. 2446, 2451 (2016) (observing that most States have broad civil asset forfeiture laws, though eight require predicate criminal convictions and one no longer authorizes it at all). In particular, Indiana Code section 34-24-1-1 authorizes forfeiture of all vehicles used "to transport or in any manner to facilitate the transportation of ... [a] controlled substance for the purpose of ... [d]ealing in ... a narcotic drug ... [d]ealing in a schedule I, II, or III controlled substance ... [p]ossession of ... a narcotic drug."

Accordingly, following Timbs's arrest, private lawyers acting under the authority of an elected prosecuting attorney filed a complaint seeking forfeiture of the Rover as an instrumentality of drug dealing. Compl. For Forfeiture (Aug. 5, 2013). Timbs's answer simply denied the allegations in the forfeiture complaint and did not raise any constitutional objection to the forfeiture. Answer (Aug. 29, 2013).

The trial court found that Timbs had indeed used the Rover to transport heroin that he later sold, but concluded—without hearing any argument from the

parties on the point—that the forfeiture would violate the Eighth Amendment's Excessive Fines Clause because the value of the Rover was about four times the maximum fine applicable to the drug-dealing charge to which Timbs had pled guilty. J. Order ¶¶ 3, 6–9 (Aug. 28, 2015).

The State moved to correct error and argued that forfeiture of the Rover was not grossly disproportionate in light of the gravity of Timbs's offense and the frequency with which he used the vehicle to transport his illicit product to customers. Hrg. Tr. 52:02–55:02. The State did not argue that the Excessive Fines Clause is inapplicable to state civil asset forfeitures.

The trial court denied the motion, and the State appealed, reiterating its argument that the forfeiture was not disproportionate. Appellant Br. 9–19 (Mar. 30, 2016). The State also acknowledged the "difficult," "threshold question of whether the Excessive Fines Clause even applies to the states, as the Bill of Rights originally applied only to the federal government," but argued that the Court need not decide the question "because the penalties imposed were not unconstitutionally excessive." *Id.* 11 n.1.

A divided panel of the Indiana Court of Appeals affirmed, noting the existence of an "excessive fines" provision in the Indiana Constitution and its prior incorporation of the Eighth Amendment's Excessive Fines Clause against forfeitures. It agreed, over a dissent, that forfeiture of the Rover was grossly disproportionate to the gravity of Timbs's offense. Pt. App. 17–24.

The State sought transfer to the Indiana Supreme Court, again arguing that the forfeiture was not grossly disproportionate. That court granted transfer and reversed. Disregarding "the State's choice not to wage the incorporation battle," it held that the Fourteenth Amendment does not incorporate the Eighth Amendment's Excessive Fines Clause against the States. Pet. App. 9–10.

REASONS TO DENY THE PETITION

I. This Case Is a Flawed Vehicle for Determining Whether the Excessive Fines Clause Is Incorporated

Timbs's case is far from an ideal vehicle for resolving the incorporation question. Two flaws in particular suggest waiting for a case that presents the issue more cleanly.

1. First, throughout the proceedings below, neither Timbs nor the State addressed the question Timbs now asks the Court to answer. The closest either party came is the footnote the State included in its opening brief before the Indiana Court of Appeals noting the "difficult question" of incorporation but arguing that the court "need not decide" it. Appellant Br. 11 n.1 (Mar. 30, 2016).

The absence of briefing on the incorporation question below would significantly impede the Court's consideration of the issue, for it would not have the benefit of arguments tested and refined in lower courts.

Cf. United States v. Bestfoods, 524 U.S. 51, 72–73 (1998) (declining to entertain an issue on which the courts below did not focus). Had the issue been raised earlier in these proceedings, the parties would have had an opportunity to develop record evidence bearing on this question—evidence concerning, for example, the historical practice of state civil asset forfeitures. And gathering this evidence in the proceedings below would be far preferable to assembling it in the first instance in briefs before the Court. *See Sykes v. United States*, 564 U.S. 1, 31 (2011) (Scalia, J. dissenting) ("Supreme Court briefs are an inappropriate place to develop the key facts in a case. We normally ... leav[e] important factual questions to district courts and juries aided by expert witnesses and the procedural protections of discovery."), *overruled by Johnson v. United States*, 135 S. Ct. 2551 (2015). The Court would be better served to wait for a case where the incorporation issue was litigated from the beginning of the proceedings, rather than raised sua sponte by the lower court.

2. Second, if the Court were to grant Timbs's petition it would need to do more than simply decide whether the Fourteenth Amendment incorporates the Excessive Fines Clause against the States as a general matter. Because this case involves a forfeiture and not a fine, the Court would need also to determine whether the Excessive Fines Clause restricts States' use of civil asset forfeitures specifically.

The need to address the application of the Excessive Fines Clause to state civil asset forfeitures would

complicate the Court's work considerably. The "selective incorporation" test the Court uses to determine whether a right enumerated in the Bill of Rights "is incorporated in the concept of Due Process" asks whether the right "is fundamental to *our* scheme of ordered liberty, or ... whether this right is deeply rooted in this Nation's history and tradition." *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 767 (2010) (citations and internal quotation marks omitted). This inquiry requires a thorough examination of the historical facts. In *McDonald*, for example, the Court marshalled statements declaring the importance of the right to keep and bear arms from the Founding and Fourteenth Amendment ratification periods to demonstrate that "the Framers and ratifiers of the Fourteenth Amendment counted the right ... among those fundamental rights necessary to our system of ordered liberty." *See id.* at 767–778. Similarly, determining whether the Excessive Fines Clause restricts States' use of civil asset forfeitures would require a detailed look through the historical record to assess the prevalence of States' use of civil asset forfeitures and the existence, if any, of claims that individuals had a legal right to be free from "excessive" forfeitures.

Assembling the historical evidence correctly is not only crucial but also labor-intensive and time-consuming—particularly given the lack of briefing below. Both Timbs and the State would essentially be starting from scratch. The Court should wait for a case that cleanly presents the question of incorporation alone and that leaves for a later case whether and how

the Excessive Fines Clause applies to States' use of civil asset forfeitures.

II. The Court Should Wait to Determine Whether the Excessive Fines Clause Is Incorporated

The Court need not settle for a flawed vehicle to address whether the Excessive Fines Clause is incorporated against the States by the Fourteenth Amendment. Indeed, rather than rushing to answer that question, there are two reasons the Court may comfortably wait for a case that more cleanly presents the incorporation question: There are similar prohibitions of excessive fines in state constitutions, and waiting would provide more chances for lower courts to apply the selective incorporation test the Court reiterated in *McDonald*.

1. First, waiting to decide the incorporation question poses little risk of harm because state constitutions already limit the fines States can impose. *Every* State in the Union—including Indiana—has a state constitutional provision prohibiting the imposition of excessive fines. *See* Nicholas M. McLean, Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause, 40 Hastings Const. L.Q. 833, 876–77 & n.177 (2013) (explaining that forty-seven States have clauses specifically prohibiting "excessive fines" and that the remaining three States have clauses either requiring proportionality for penalties or prohibiting excessive punishments generally); Ind. Const. art. 1, § 16 ("Excessive bail shall not be required. Excessive fines shall not be imposed. Cruel

and unusual punishments shall not be inflicted. All penalties shall be proportioned to the nature of the offense.").

There is no reason to doubt that these state constitutional provisions are just as protective as their federal analogue. Many of the decisions Timbs cites use the same analysis for claims under both federal and state constitutional "excessive fine" provisions. *See, e.g., Miller v. One 2001 Pontiac Aztek*, 669 N.W.2d 893, 897 (Minn. 2003); *Ex parte Kelley*, 766 So. 2d 837, 837 (Ala. 1999); *Commonwealth v. Fint*, 940 S.W.2d 896, 897–98 (Ky. 1997); *State v. Hill*, 635 N.E.2d 1248, 1256 (Ohio 1994). The Indiana Supreme Court, for example, has specifically held that Article 1, § 16 of the Indiana Constitution should be interpreted in parallel with the Eighth Amendment, explaining in review of a mandatory life sentence that it could "see no reason for creating a greater or lesser standard under article one, section sixteen [of Indiana's Constitution] when its language is so similar to the relevant Eighth Amendment standard." *Norris v. State*, 394 N.E.2d 144, 150 (Ind. 1979).

Such state supreme court decisions show that the Court should wait to see how these courts apply their state constitutions' "excessive fines" provisions to civil asset forfeitures. Indeed, denying Timbs's petition may even encourage individuals seeking to recover forfeited property to raise state constitutional claims in addition to Eighth Amendment claims. More state constitutional claims would afford more chances for state courts to expound the meaning of analogous state constitutional provisions, which would, in turn,

inform the Court's ultimate consideration, sometime in the future, of whether and how to apply the Excessive Fines Clause to state civil asset forfeitures.

2. Second, the Court should wait until it has obtained "the benefit it receives from permitting several courts of appeals to explore a difficult question before [it] grants certiorari." *United States v. Mendoza*, 464 U.S. 154, 160 (1984). Lowers courts' analyses provide invaluable assistance to the Court. *See E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 135 n.26 (1977) (observing "the wisdom of allowing difficult cases to mature through full consideration by the courts of appeals."). With respect to the incorporation of the Excessive Fines Clause, however, the lower-court record remains incomplete.

Only a handful of the decisions cited in Timbs's petition directly addressed whether the Excessive Fines Clause is incorporated. *See, e.g., Qwest Corp. v. Minnesota Public Utilities Commission*, 427 F.3d 1061, 1069 (8th Cir. 2005); *Commonwealth v. 1997 Chevrolet*, 160 A.3d 153, 162 n.7 (Pa. 2017); *Pub. Emp. Ret. Admin. Comm'n v. Bettencourt*, 47 N.E.3d 667, 672 n.7 (Mass. 2016); *Vanderbilt Mortg. & Fin. v. Cole*, 740 S.E.2d 562, 570 n.10 (W. Va. 2013); *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.*, 124 P.3d 408, 420 (Cal. 2005), *as modified* (Jan. 18, 2006); *State v. 2003 Chevrolet Pickup*, 202 P.3d 782, 783 (Mont. 2009); *One (1) Charter Arms, Bulldog 44 Special v. State ex rel. Moore*, 721 So.2d 620, 623 (Miss.1998).

Meanwhile, a few more decisions noted but did not answer the incorporation question. *See, e.g., Simic v.*

City of Chicago, 851 F.3d 734, 739 (7th Cir. 2017); *Cripps v. La. Dep't of Agric. & Forestry*, 819 F.3d 221, 234 (5th Cir. 2016); *Engquist v. Oregon Dept. of Agriculture*, 478 F.3d 985, 1005 n.21 (9th Cir. 2007).

Most, however, simply held that the Clause applies to state *forfeitures* without addressing whether it applies to States at all. *See, e.g., One 2001 Pontiac Aztek*, 669 N.W.2d at 895; *State v. Real Property at 633 East 640*, 994 P.2d 1254, 1256 (Utah 2000); *Ex parte Kelley*, 766 So. 2d at 840; *Fint*, 940 S.W.2d at 897–98; *Levingston v. Washoe Cty.*, 916 P.2d 163, 169 (Nev. 1996); *In re 1982 Honda*, 681 A.2d 1035, 1039 (Del. 1996); *Hill*, 635 N.E.2d at 1254; *People ex rel. Waller v. 1989 Ford F350 Truck*, 642 N.E.2d 460, 464–65 (Ill. 1994); *Thorp v. State*, 450 S.E.2d 416, 417 (Ga. 1994), *abrogated on other grounds by Howell v. State*, 656 S.E.2d 511 (Ga. 2008); *Idaho Dept. of Law Enforcement By and Through Cade v. Free*, 885 P.2d 381, 383 (Idaho 1994).

It bears observing that *none* of these decisions addressed the question Timbs has presented here: whether the Court's "selective incorporation" framework requires interpreting the Fourteenth Amendment to incorporate the Excessive Fines Clause against the States. *See, e.g., McDonald*, 561 U.S. at 763–64. Instead, to the degree these decisions addressed incorporation at all, they relied entirely on stray dicta. *See, e.g., Qwest Corp*, 427 F.3d at 1069 (citing *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* 532 U.S. 424, 433–34 (2001)); *1997 Chevrolet*, 160 A.3d at 162 n.7 (same); *Bettencourt*, 47

N.E.3d at 672 n.7 (same); *Cole*, 740 S.E.2d 562, 570 n.10 (same).

Delaying consideration of the incorporation question would give the lower courts an opportunity to engage in the substantive "selective incorporation" analysis required by the Court's precedents. Indeed, denying Timbs's petition would implicitly reiterate the obligation of lower courts to apply the appropriate test rather than await an answer from the Court.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

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